



NTSB ORDER No.  
EM-14

UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD  
WASHINGTON, D. C.

Adopted by the National Transportation Safety Board  
at its office in Washington, D. C.  
on the 6th day of January, 1971.

CHESTER R. BENDER, Commandant, United States Coast Guard

vs.

JAMES SHELTON DAVIS

Docket ME-14

OPINION AND ORDER

The appellant, James Shelton Davis, has appealed to this Board from the decision of the Commandant, served June 8, 1970, sustaining the revocation of his Merchant Mariner's Document, No. Z-551792-D4, and all other seaman's documents.<sup>1</sup> The action was previously appealed to the Commandant pursuant to 46 U.S.C. 239(g), from the initial decision of Coast Guard Examiner Martin J. Norris, dated March 12, 1969.<sup>2</sup>

The examiner's decision was entered after a full evidentiary hearing, at which appellant was charged with misconduct under 46 U.S.C. 239(g), arising from his employment as a fireman/watertender on the SS PIONEER GLEN, a merchant vessel of the United States. It was alleged in support of the charge that on March 5, 1965, appellant wrongfully had five marijuana cigarettes in his possession on board the vessel at the port of Boston, Massachusetts.

Customs officers testified that on March 5, 1965, at 8:30 a.m., they had boarded the PIONEER GLEN for the purpose of searching the vessel for contraband, under authority of 19 U.S.C. 1581 AND 1582. At about 10:15 a.m., in the course of their general search, two of the officers, Gustafson and Herwins, knocked at the

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<sup>1</sup>Appeal to this board from the Commandant's revocation action is authorized under 49 U.S.C. 1654(b)(2) and is governed by the Board's rules of procedure set forth in 14 CFR Part 425.

<sup>2</sup>Copies of the decisions of the examiner and the Commandant are attached hereto as Exhibits A and B, respectively.

door of appellant's cabin, which he shared with another crewmember, Clarence Lamb. Appellant was alone in the room, lying on the upper bunk. The officers identified themselves and started a search of the room. Within a matter of minutes, Gustafson found a marijuana cigarette in the pocket of a jacket hanging in one of appellant's lockers. Gustafson testified that at this time he recognized the substance as marijuana and impounded it.

Appellant asked to leave the room to go to the lavatory and, after searching him, the officers allowed him to go under escort. Thereafter, when appellant returned to his room, there were two additional Customs officers present, Skerry and Bowen, who had been summoned by Gustafson. As these officers proceeded with an intensive search of appellant's quarters, Herwins found loose traces of marijuana in the pockets of appellant's walking shorts; and Skerry, who was the officer in charge of the boarding party, found a cigarette package on the shelf above appellant's bunk, which contained five handmade marijuana cigarettes. Without warning appellant as to his rights to counsel and to remain silent, or that his statements might be used against him, Skerry asked appellant where he had obtained the marijuana cigarettes and appellant admitted that he had gotten them in Mexico.<sup>3</sup>

Testifying in his own behalf, appellant denied that any of the marijuana found in his room belonged to him. He claimed that his room had not been locked; the shelf above his bunk was open; his locker and the suitcase where his walking shorts were found were not locked; and anyone aboard had access to place the marijuana among his effects. He indicated that his roommate, Lamb, would have had such motive and testified further that Lamb had smoked marijuana cigarettes in their room and had offered them to him on two occasions, but that he had refused them. Moreover, he stated that his relations with Lamb had deteriorated because of his refusal to cooperate with him in pressing charges against a ship's officer, whereupon Lamb in a threatening manner, had told him to get off the ship. Appellant admitted telling one of the Customs officers that he had obtained the marijuana in Mexico, but claimed that he had been led to believe that this admission would not be used against him.<sup>4</sup>

The examiner accepted the testimony of the Customs officers

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<sup>3</sup>It appears from the record that Veracruz, Mexico, had been one of the intermediate stops of the PIONEER GLEN while the ship was en route to Boston on a return voyage from Australia, via the Panama Canal.

<sup>4</sup>Tr., p. 59.

and of a customs chemist that tests of the substances seized in the search of appellant's quarters showed that they contained varying and appreciable quantities of marijuana. The examiner therefore found that appellant, on the date in question aboard the PIONEER GLEN, had wrongful possession of six marijuana cigarettes, as well as gleanings and traces of marijuana. He accordingly concluded that the misconduct charge was established and that the nature of the material found in appellant's possession "is of such harmful effect toward the ultimate of safety of life and property at sea that the only proper order that may be made under these circumstances is that of revocation."

On appeal, the Commandant rejected contentions based on objections repeatedly made by appellant's counsel at the hearing with respect to the reception of testimony from the Customs officers concerning appellant's admission to Skerry that he had acquired certain of the marijuana cigarettes in Mexico. It was argued that such testimony is subject to exclusion under the Supreme Court's ruling in Miranda v. Arizona, 384 U.S. 436 (1966), as well as Coast Guard regulations; and that, absent this inculpatory admission, there was insufficient evidence to establish that the marijuana belonged to the appellant.

Both the examiner and the Commandant held that the Miranda case was not applicable in administrative hearings. The Commandant also cited Johnson v. New Jersey, 384 U.S. 719 (1966), wherein the Supreme court determined that the Miranda decision would not have retroactive effect. The commandant further found that the circumstantial evidence of record was sufficient to support the examiner's findings without appellant's admission.

On appeal to this Board, appellant's counsel relies on his brief to the Commandant, seeking the exclusion of appellant's "alleged confession," and a reversal of the Commandant's decision with a direction to remand the case to the examiner. Counsel for the Commandant has not filed a brief.

Upon consideration of appellant's brief and the entire record, we conclude that his misconduct was established by substantial evidence of a probative and reliable character. To the extent not modified herein, we adopt the findings of the examiner and the Commandant as our own. Moreover, we find that the sanction imposed was warranted under 46 U.S.C. 239(g) and the applicable Coast Guard regulations issued thereunder.<sup>5</sup>

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<sup>5</sup>Misconduct by a seaman involving the possession of marijuana while serving in the U.S. Merchant Marine under the authority of his document is regarded as a serious offense

Miranda warnings are applicable only in instance of "custodial interrogation" which the Supreme Court defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."<sup>6</sup> Appellant relies on the rule of that case, claiming that it is applicable here both in fact and in law, and operates to exclude his damaging admission to Customs officer Skerry. It is conceded that the customs officers had authority to arrest appellant on criminal charges and that he was not given cautionary warnings prior to his admission. Furthermore, appellant testified that he was arrested as a direct consequence of the Customs investigation, and after trial was acquitted by a "judge and jury in Boston, Massachusetts."<sup>7</sup>

In support of his contention that he was under custodial interrogation, appellant points to the circumstances that he had been confined in his room with "first two and then four Customs officials for about an hour"; his request for permission to leave the room was made in the belief that he was in custody; and he was in fact permitted to leave his room only under escort and after he had been personally searched. Appellant asserts that these circumstances constituted a custodial interrogation and that, as a matter of law, his admission was subject to judicial exclusion in a criminal proceeding. On that basis, he argues that due process in administrative proceedings "dictates" that the same rule be

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affecting adversely the safety of life at sea, the welfare of seaman and the protection of property aboard ship, for which the Coast Guard will initiate administrative action seeking the revocation of seaman's documents, 46 CFR § 137.03-5(a), (b)(8). Recently, the regulation in 46 CFR § 137.03-3, requiring revocation by the examiner upon proof of possession of marijuana, was relaxed by the Commandant, to provides that "... where the examiner is satisfied that the use, possession or association, was the result of experimentation by the person and the person has submitted satisfactory evidence that such use will not recur, he may enter an order less than revocation." (35 Federal Register 16371.) However, appellant's claim at this date that his possession of the marijuana was for experimental use that would not recur, would be wholly inconsistent with his sworn testimony at the hearing.

<sup>6</sup>Miranda v. Arizona, supra, at 444.

<sup>7</sup>Tr., p.46. Except for this testimony, the record is silent with respect to the prior criminal proceeding.

applied.<sup>8</sup>

We are not persuaded by appellant's arguments and we affirm the Commandant's finding that Miranda is not applicable. On the record before us, it does not appear that he was taken into custody or deprived of his freedom of action by the customs officers, prior to the time his admission was elicited, within the meaning of the Miranda case. Moreover, appellant's argument is based on the premise that it was error in this administrative proceeding not to exclude his admission because it would have been subject to exclusion in a judicial proceeding. This argument fails in view of the judicial determination in the prior criminal proceeding involving the appellant as defendant.<sup>9</sup> Appellant there moved to suppress his admissions to the Customs officers on the ground that they had been obtained during custodial interrogation without cautionary warnings. The court, in denying the motion, ruled, inter alia, as follows:

"When interrogated by Skerry, Davis was not under arrest. customs officials had him under detention, which did not last over an hour and a quarter, and involved no more than keeping Davis on his vessel until the officials could ask him questions about what their search had disclosed. The search was lawful. 19 U.S.C. § § 482, 1581 and 1582. The detention was lawful both by statute, 19 U.S.C. § 1582, and by common law... [citations omitted].

"It cannot be said, to use the words of the Supreme Court in Miranda.... that Davis had been 'deprived of his freedom of actions' in a 'significant way'. Hence the statements of Davis to Skerry are not subject to exclusion on the ground that they were elicited during a custodial investigation of the type directly in issue in Miranda and companion cases."<sup>10</sup>

It follows that appellant has failed to demonstrate that his admission was improperly in evidence. Moreover, we agree with the Commandant's finding that the evidence of record independent of that admission was sufficient to establish the misconduct charged

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<sup>8</sup>Appellant has cited no precedent on point for such extension of the Miranda rule. Essentially, cases he cites apply to such constitutional safeguards in administrative proceedings as the right to notice and hearing, confrontation and cross-examination. Those cases are inapposite.

<sup>9</sup>U.S. v. Davis, 259 F. Supp. 496 (D. Mass., 1966).

<sup>10</sup>Id., at 497-8.

under 46 U.S.C. 239(g) and the applicable Coast Guard regulations.

One final matters concerning appellant's contention that his damaging admission to Skerry was made involuntarily, warrants brief comment. He claims that this evidence was thereby prohibited by Coast Guard regulations.<sup>11</sup> Skerry testified that he had offered no inducement to appellant, either by threat or by indication, that he would receive lenient treatment if he cooperated.<sup>12</sup> Furthermore, the examiner, who is the tried of facts, found appellant's credibility as a witness was "seriously affected" by his untruthful testimony concerning his prior disciplinary record. Upon consideration of the record, and the examiner's credibility findings, we are satisfied that appellant's statement to Skerry was elicited without threat or inducement. The contention that Coast Guard regulations were violated in therefore without foundation.

ACCORDINGLY, IT IS ORDERED THAT:

1. The instant appeal be and it hereby is denied; and
2. The order of the Commandant affirming the examiner's revocation of appellant's seaman's documents under authority of 46 U.S.C. 239(g) be and it hereby is affirmed.

REED, chairman, LAUREL, McADAMS, THAYER, and BURGESS, Members of the Board, concurred in the above opinion and order.

(SEAL)

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<sup>11</sup>In this connection, appellant cites 46 CFR 137.20-125, which provides: "Any person other than a Coast Guard investigating officer may testify as to admissions voluntarily made by the person charged in the presence of the witness other than during or in the course of an investigation by the Coast Guard."

<sup>12</sup>Tr., p. (9) 42.